No. 76-144

In the Supreme Court of the United States

OCTOBER TERM, 1976

MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND T. E. WALDRIP,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

Jerry L. Buchmeyer
2300 Republic Bank Building
Dallas, Texas 75201
Attorney for Petitioner

Of Counsel:
Timothy R. McCormick
Thompson, Knight, Simmons & Bullion
Dallas, Texas

Seth Waller
Secaucus, New Jersey

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CITY OF FARMERS BRANCH, TEXAS AND T. E. WALDRIP,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

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Matsushita Electric Corporation of America petitions for a Writ of Certiorari to review a judgment of the Supreme Court of Texas entered on May 5, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (Appendix, *infra*, A1-6) is not yet officially reported.[1] The opinion of the Texas Court of Civil Appeals (Appendix, *infra*, A9-22), is reported in 527 S.W.2d 768 (Tex. Civ. App. — Tyler 1976).

[1] An unofficial opinion has been published in 19 TEX. SUP. CT. J. 303 (May 5, 1976).

JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 5, 1976 (App. A-7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

On January 14, 1976, this Court announced its decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). *Michelin* overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871) and held that states are not prohibited by Article I, Section 10, Clause 2 of the United States Constitution (the "Import-Export Clause") from imposing a nondiscriminatory ad valorem property tax on imported goods no longer in import transit. Relying upon *Michelin*, the Texas Supreme Court held in *Matsushita Electric Corporation v. City of Farmers Branch, Texas and T. E. Waldrip* that the City of Farmers Branch, Texas could assess a nondiscriminatory ad valorem tax on imported goods in Matsushita's warehouse for the year 1972, four years *prior* to *Michelin*.

The questions presented are:

(1) Whether a state court is required to apply the test articulated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to determine whether a decision of this Court should have prospective effect only;

(2) Whether *Chevron* requires that the decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), be accorded prospective effect only.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. art. I, section 10 provides:

"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; * * *."

STATEMENT

This controversy involves the liability of importers for nondiscriminatory ad valorem property taxes assessed on imported goods — which remained in the original, unbroken packages in which they were shipped — for the period prior to this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

1.

In 1972, the City of Farmers Branch and its Tax Assessor-Collector, T. E. Waldrip, imposed ad valorem taxes on certain personal property held by Matsushita Electric Corporation of America on January 1, 1972 within the city of Farmers Branch, Texas. Relying upon this Court's decisions in *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872) and *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419 (1827), Matsushita Electric Corporation of America requested an exemption from taxation for those imported goods situated in its warehouse which remained in the original packages in which such products were shipped. (App. A10-11). Farmers Branch denied the request.

Matsushita Electric Corporation successfully enjoined collection of the disputed taxes.[2] In *City of Farmers Branch v. Matsu-*

[2] Matsushita Electric Corporation of America v. City of Farmers Branch and T. E. Waldrip, No. 72-9516-G (134th Judicial District Court of Dallas County, Texas, filed October 14, 1974).

shita Electric Corporation of America, 527 S.W.2d. 768 (Tex. Civ. App. — Tyler 1975), (App. A-9), the Texas Court of Civil Appeals affirmed the decision. Relying upon this Court's decisions in *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419 (1827) and *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), the Court held that imported goods contained in the original packages which retained their distinctive character as imports were not subject to ad valorem property taxes, regardless of whether such tax was nondiscriminatory. (App. A-17). On January 14, 1976, the Supreme Court of Texas denied the City of Farmers Branch's application for Writ of Error.[3]

On the same day, January 14, 1976, this Court announced its decision in *Michelin Tire Corporation v. Wages*, 423 U.S. 276 (1976). *Michelin* overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), and held that a local taxing authority could assess a nondiscriminatory tax on imported goods no longer in import transit.

2.

Farmers Branch applied for a rehearing on its application for Writ of Error based upon this Court's decision in *Michelin*. The Supreme Court of Texas granted the application. The merits of *Michelin* were not argued by petitioner before the Texas Supreme Court. Instead, petitioner contended that the principles articulated by this Court in *Chevron Oil Co. v. Huson* controlled and therefore the Supreme Court of Texas should accord only prospective effect to the decision in *Michelin* and deny Farmers Branch's assessments for the years *prior* to *Michelin*.

[3] The Supreme Court of Texas refused the writ with the notation "no reversible error." The action of the court is unofficially reported in 19 TEX. SUP. CT. J. 134 (Jan. 14, 1976).

The Supreme Court of Texas reversed the lower courts and held that *Michelin* was retroactive in application (App. A5-6).

REASONS FOR GRANTING THE WRIT

1. In matters of federal law, state courts must adhere to federal standards in determining whether a constitutional decision should be applied prospectively.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) this Court articulated the standards to be used by reviewing courts to determine whether a civil decision involving a question of federal law should be applied prospectively only:[4]

(a) the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding a question of first impression whose resolution was not clearly foreshadowed;

(b) the merits and demerits in each case must be weighed to determine whether the purpose of the overruling case can be effected without retroactive application; and

(c) retroactive application would produce substantial inequitable results.

The factors enumerated by this Court in *Chevron* are refinements of the standards adopted in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967), for determining whether decisions involving substantial reinter-

[4] This Court has made it clear, however, that for purposes of prospective or retroactive application of an overruling decision, no distinction should be drawn between civil and criminal cases. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 199 (1973); Linkletter v. Walker, 381 U.S. 618, 627 (1965).

pretations of rights of the criminally accused should be given retroactive effect.

This Court has recognized that reviewing courts have "some" discretion in determining whether a particular decision should be accorded prospective effect only. This discretion arises because each particular constitutional rule has its own function, background of precedent and impact on the administration of justice. *Johnson v. New Jersey*, 384 U.S. 719 (1966). A reviewing court must reconcile competing policy interests — convenience, expense and proper governmental objectives versus the rights of the individual affected. However, the limits of discretion do not extend to ignoring or altering the basic decisional standards adopted by this Court. Therefore, in cases subsequent to *Linkletter* and *Stovall*, state and federal courts have considered the standards articulated by this Court to determine the retroactive or prospective effect of a criminal decision to be binding. *See, e.g., Williams v. Estelle*, 500 F.2d 206 (5th Cir. 1974); *Wiggins v. State*, 275 Md. 689, 344 A.2d 80 (1975); *People v. Livingston*, 64 Mich. App. 247, 236 N.W.2d 63 (1975).

The rationale for applying uniform standards in criminal cases is equally applicable to the civil area. Federal cases subsequent to *Chevron* have interpreted *Chevron* to be mandatory in civil cases involving questions of federal or constitutional law. *Bush v. Wood Brothers Transfer, Inc.*, 398 F. Supp. 1030 (S.D. Tex. 1975); *Bergstrom v. Kissinger*, 387 F. Supp. 794 (D.D.C. 1974).

Although federal courts have adopted *Chevron* as the controlling standard, state courts have not always applied *Chevron*

in cases involving federal or constitutional law, *see, e.g., City of Farmers Branch and T. E. Waldrip v. Matsushita Electric Corporation of America*, _____ S.W.2d _____, (App. A25), or have misapplied *Chevron*. *See Ralston Purina Co. v. County of Los Angeles*, 56 Cal. App. 3d. 547, 128 Cal. Rptr. 556 (1976).[5]

When this Court substantially changes existing federal or constitutional law, the same considerations applicable to the criminal area are applicable to civil cases. Uniform standards are necessary to ensure that equitable results are reached. This is particularly true because of this Court's decision in *Michelin*. Importers are faced with the possibility of state courts applying different standards of retroactivity, depending upon applicable periods of limitations in each state.[6]

This Court has not provided specific guidance to lower courts on the applicability of *Chevron* to constitutional decisions rendered by this Court, and this issue is proper for resolution by writ of certiorari. *See, e.g., United States v. Peltier*, 422 U.S. 531 (1975); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Relford v. Commandant*, 397 U.S. 534 (1970).

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[5] *See also*, Sears, Roebuck & Co. v. County of Kings, _____ Cal. App. 3d _____, 130 Cal. Rptr. 694 (1976); Japan Food Corporation v. County of Sacramento, _____ Cal. App. 3d _____, 130 Cal. Rptr. 392 (1976); Michelin Tire Corp. v. County of San Mateo, 57 Cal. App. 3d 332, 127 Cal. Rptr. 791 (1976).

[6] For example, Texas allows a taxing authority to reassess for a period of four years, TEX. REV. CIV. STAT. ANN. art 7298 (1960); Georgia, seven years. GA. CODE ANN. § 92-7701 (1974). In Ralston Purina Co. v. County of Los Angeles, 56 Cal. App. 3d 547, 128 Cal. Rptr. 556, 558 (1976), the Court upheld, on the basis of *Michelin*, taxes assessed in violation of Low v. Austin, 80 U.S. (13 Wall.) 29 (1871) for a period of eight years prior to *Michelin*. Ohio, however, has decided to treat *Michelin* as applying only prospectively. 37 CCH STATE TAX REVIEW No. 11 (Mar. 16. 1976).

2. The Decision of the Supreme Court of Texas is in direct conflict with Chevron Oil v. Huson.

In *Chevron*, the Court established three factors to determine if a decision should be accorded prospective effect only: reliance on clear past precedent, the purpose of the overruling decision could be effected without retroactive application, and retroactive application would produce inequitable results.

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), a decision which was settled law for over one hundred years. Matsushita and others similarly situated relied upon the principle established in *Low* that nondiscriminatory ad valorem taxes on imports were prohibited by the Import-Export Clause of the United States Constitution. Matsushita's position was affirmed by the Texas Court of Civil Appeals in an opinion strongly relying upon this holding in *Low*. (App. A-17).

The Supreme Court of Texas, although initially denying an application for writ of error filed by the City of Farmers Branch,[7] abruptly reversed their position after the *Michelin* decision and, without once mentioning this Court's decision in *Chevron*, held that Matsushita's *reliance* on *Low* was misplaced.[8]

This Court has held that parties are entitled to rely upon legal pronouncements from this Court and parties who conform their conduct to prevailing constitutional norms cannot be held blameworthy. *United States v. Peltier*, 422 U.S. 531 (1975). Further,

[7] 19 TEX. SUP. CT. J. 134 (Jan. 14, 1976).

[8] This was somewhat anomalous in view of the statement of the Court that:

> Because of the earlier decision of the Supreme Court of the United States which this Court is bound to respect, we at first upheld the position of Matsushita.

(App. A-2).

this Court upheld "reliance" upon statutory schemes which are constitutionally suspect from their very inception. *Lemon v. Kurtzman*, 411 U.S. 192 (1973). The Supreme Court of Texas, contrary to the position taken by this Court, held that Matsushita was not entitled to rely upon *Low* simply because Farmers Branch had levied its tax prior to *Michelin*.[9] The reliance discussed by this Court clearly encompassed reliance on prevailing constitutional doctrine and such reliance cannot be defeated merely by the arbitrary acts of governmental officials who disagree with a particular position taken by this Court.

The purpose of *Michelin* can be clearly effected without retroactive application of *Michelin*. In *Michelin*, this Court noted that ultimate consumers should pay for local governmental services funded by ad valorem property taxes on goods, much as they pay for transportation costs associated with such goods. 423 U.S. _____, 45 L.Ed.2d 505. The taxes assessed by the City of Farmers Branch were assessed four years prior to *Michelin* and the goods have been sold to the ultimate consumer. Prior to *Michelin*, business decisions and ad valorem taxation were based, in part, upon the absolute ban on ad valorem taxes on imported goods. To reach back now and disturb past legal relationships would not further the purpose of *Michelin* because it would penalize those who relied upon *Low*, allow local municipalities to reap a windfall in added revenues without a concomitant increase in the expenses of local services, and not affect those who actually benefited from *Low* — the ultimate consumer. Allowing full retroactive application of

[9] Other state courts have ignored or misapplied the concept of reliance, some going so far as to hold that *Low* itself was not sufficient as clear past precedent. *See, e.g.*, Ralston Purina Co. v. County of Los Angeles, 56 Cal. App. 3d 547, 128 Cal. Rptr. 556 (1976).

Michelin would require Matsushita, and all other similarly situated importers, to absorb increased costs without being able to internalize such costs in the goods which allegedly benefited from such services.[10]

3. The questions presented are substantial.

The Supreme Court of Texas held, in part, that *Michelin* was fully retroactive because this Court denied Michelin's petition for rehearing. The reasoning of the court further illustrates the confusion permeating lower court decisions faced with a prospective-retroactive problem. This Court has held that a determination not to review a question imports no expression of opinion on the merits. *United States v. Carver*, 260 U.S. 482, 490 (1923). Nevertheless, lower courts have held that new decisions are fully retroactive in the absence of a definitive statement by this Court. *See, e.g., Bourns, Inc. v. Allen-Bradley Co.*, 480 F.2d 123 (9th Cir.), *cert. denied*, 414 U.S. 1094 (1973); *Ralston Purina Co. v. County of Los Angeles*, 56 Cal. App. 3d 547, 128 Cal. Rptr. 556 (1976). Such a position has been severely criticized[11] and does not reflect past decisions of this Court. In both *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Chevron*, this Court determined that *prior* decisions[12] were not to be applied retroactively and the extensive discussion of the non-retroactivity doctrine would

[10] Reversing the facts in the present case would not change the retroactive-prospective analysis. In situations where a taxpayer has been successful against a taxing authority, courts have limited the decision to prospective effect only. See Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770, 778 (1963).

[11] Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1617 (1975).

[12] Lemon v. Kurtzman, 403 U.S. 602 (1971); Rodrigue v. Aetna Casualty & Surety Co. 395 U.S. 352 (1969).

have been wasted if the prior decision had foreclosed the issue.

This Court has held the issue of prospective overruling is best resolved in a case where the issue of retroactivity would be solely dispositive of the case. *Gosa v. Mayden*, 413 U.S. 665, 668 (1973); *Relford v. Commandant*, 401 U.S. 355, 370 (1971). The issues presented in the present petition would be resolved by a determination by this Court of the questions presented. Petitioner does not question the holding of this Court in *Michelin*. Petitioner does however, request that this Court determine whether state courts must apply the *Chevron* standards to determine the retroactivity of a decision of this Court and whether, under *Chevron*, *Michelin* should be accorded prospective effect only. The failure of this Court to resolve this confusion in the lower courts surrounding both the doctrine of prospective overruling and the decision in *Michelin* will result in great hardship to those who have made decisions based upon settled constitutional law.

CONCLUSION

For the foregoing reasons. a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Texas.

Respectfully submitted,

Jerry L. Buchmeyer
2300 Republic National
Bank Building
Dallas, Texas 75201

Attorney for Petitioner

Of counsel:
Timothy R. McCormick
Thompson, Knight, Simmons &
Bullion
2300 Republic Bank Building
Dallas, Texas

Seth Waller
One Panasonic Way
Secaucus. New Jersey

CERTIFICATE OF SERVICE

I, Jerry L. Buchmeyer, attorney for petitioner Matsushita Electric Corporation of America and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 30, 1976, I served three copies of the foregoing petition for writ of certiorari on the respondents herein by hand-delivering the same to Ronald M. Mankoff, Esq., counsel of record for the respondents, at his office at 3900 First National Bank Building, Dallas, Texas. I further certify that all parties required to be served have been served.

Jerry L. Buchmeyer
2300 Republic National Bank Bldg.
Dallas, Texas 75201
Attorney for Petitioner

APPENDIX

1. Opinion of the Supreme Court of Texas.

In the

Supreme Court of Texas

No. B-5551

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,
Petitioners,

v.

MATSUSHITA ELECTRIC CORP. OF AMERICA,
Respondent.

Appeal from the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District

May 5, 1976

This case involves an interpretation of Section 10 of Article I of the Constitution of the United States, which provides in part that,

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . ."

The City of Farmers Branch assessed a nondiscriminatory ad valorem tax on merchandise stored in warehouses within

its limits. In 1972, it assessed such a tax on the merchandise here in question. It had been imported from Japan and Puerto Rico and was the property of Matsushita Electrical Corporation of America, a wholly owned subsidiary of a Japanese corporation of a similar name.

The property had come to its destination in Farmers Branch, but was still in its original corrugated cartons. Matsushita declined to pay the tax. In this declaratory judgment suit, its contention is that the tax on its property is unconstitutional under the above provision of the Constitution of the United States.

Because of the earlier decision of the Supreme Court of the United States which this court is bound to respect, we at first upheld the position of Matsushita. The Court of Civil Appeals had held the property was not subject to taxation by the city, and we upheld that decision by refusing a writ of error with a notation, "no reversible error." 527 S.W.2d 768. Upon the same day upon which our court acted, January 14, 1976, the United States Supreme Court announced its decision in *Michelin Tire Corporation v. Wages*, _____ U.S. _____, 96 S.Ct. 535, 46 L.Ed.2d 495. We thereafter granted a writ of error upon rehearing. It is our opinion that under *Michelin*, the tax of the City of Farmers Branch is not an unconstitutional tax. In the words of the *Michelin* decision, an ". . . assessment of a nondiscriminatory ad valorem property tax . . . is not within the constitutional prohibition against laying any imposts or duties upon imports . . . "

The property which is the subject of the tax consists of Panasonic units and parts manufactured by or for Matsushita in Japan and Puerto Rico. The items were packed in sealed

corrugated cartons and were shipped to the United States in sea vans. After the sea vans reached their port of entry, they were shipped by rail to Fort Worth. The seals on the sea vans were broken at Matsushita's warehouse in Farmers Branch, and the individual cartons were there unloaded and stored. No manufacturing, repairing or servicing is carried on at the Matsushita warehouse. The warehouse is used only to store the merchandise until needed by retail dealers. The disputed items were all in their unopened corrugated cartons.

The "original package doctrine" had its origin in *Brown v. State of Maryland*, 25 U.S. 262 (1827), in which Chief Justice Marshall wrote:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive characteristic as an import, and has become subject to the taxing power of the state; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.*" [Emphasis supplied.]

Brown v. Maryland was enlarged upon in 1871 by *Low v. Austin*, 80 U.S. 29, which is characterized by the Supreme Court in *Michelin* as "the leading decision of the court that the States are prohibited by the Import-Export clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports . . . "

In *Michelin*, however, the Supreme Court, upon its own initiative, carefully reviewed the *Brown* and the *Low v. Austin* decisions; and it concluded that, "*Low v. Austin* was wrongly decided. That decision therefore must be, and is overruled."

We understand the holding of *Michelin* to be that where

the tax is not upon the importation or movement of imported goods, and where the goods are no longer in transit, the goods are subject to the imposition of nondiscriminatory ad valorem property taxation by the states and their subdivisions.

We agree with the Supreme Court that there is no reason why an importer should not bear his share of the cost of services such as police and fire protection along with his competitors who handle only domestic goods. As the Supreme Court said in *Michelin*, the Import-Export clause " . . . cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."

The ad valorem tax imposed by Farmers Branch is clearly nondiscriminatory and applicable to all such stored goods whether imported or not. The property of Matsushita is therefore subject to the tax.

In the alternative, Matsushita contends that because the Supreme Court changed the law in *Michelin* in 1976, that it should not be liable for taxes assessed for the year 1972 and beyond; i.e., that the *Michelin* decision should not be given retroactive effect, and that it should only be liable for taxes assessed after January 14, 1976, the date of the *Michelin* decision. We disagree for the following reasons.

First, the taxes assessed by Gwinnett County, Georgia, in the *Michelin* case were for the years 1972 and 1973, the same periods involved here. The Supreme Court upheld the judgment of the Supreme Court of Georgia that the taxes were valid, and at least by inference, that they were collectible. Michelin filed a motion for rehearing in the Supreme Court, and we were furnished with a copy of it. In the motion, Michelin

limited its argument to the retroactive effect of the *Michelin* decision, and it urged the Supreme Court to declare its opinion to be prospective only because it had changed the law in effect for 100 years. The Supreme Court overruled Michelin's motion.

Second, Matsushita contends that it is inequitable to apply the *Michelin* decision and our decision as applying to taxes assessed in 1972 because under *Low v. Austin* and other decisions, Matsushita and others then considered their goods exempt from taxation. At the same time, however, Matsushita was plainly informed and put upon notice by the City of Farmers Branch that the city considered that the goods were taxable, and that *Low v. Austin* and similar cases were wrongly decided and should be overruled. There is no basis for a contention that Matsushita relied on any previous action or non-action of the city because the city assessed the Matsushita property for taxes at its first opportunity.

And thirdly, the reasons for the collectibility of the nondiscriminatory tax as to Matsushita for the years in question are prominent in the *Michelin* decision. Matsushita's property during such period was afforded the same public services, including police and fire protection, as were afforded to their competitors and to others in the community; and there is no great inequity in their having to bear their same fair and equal share of such expense; i.e., the nondiscriminatory taxes assessed during such period.

The judgments of the trial court and the Court of Civil Appeals are reversed. The injunction issued by the trial court enjoining the assessment and collection of the taxes involved is dissolved; and judgment is here rendered that the merchan-

dise in question was and is subject to the nondiscriminatory ad valorem personal property taxes.

/s/ JOE R. GREENHILL
Chief Justice

Opinion Delivered:
May 5, 1976

2. Judgment of the Supreme Court of Texas.

JUDGMENT

Extract from the Minutes of May 5, 1976

No. B-5551

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,

v.

MATSUSHITA ELECTRIC CORPORATION OF AMERICA

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the District Court and Court of Civil Appeals, it is, therefore, *adjudged*, *ordered* and *decreed* that said judgments be, and hereby are, reversed and set aside.

And this Court now proceeding to render judgment as should have been rendered below, it is *considered*, *adjudged*, *ordered* and *decreed* that the judgment be, and hereby is, rendered that the merchandise in question was and hereby is, subject to the nondiscriminatory ad valorem personal property taxes, and accordingly the injunction issued by the trial court enjoining the assessment and collection of taxes involved be, and hereby is dissolved.

It is further ordered that respondent, Matsushita Electric Corporation of America, pay all costs expended and incurred

in this Court, Court of Civil Appeals and District Court, that petitioners, City of Farmers Branch et al., have and recover of and from respondent, Matsushita Electric Corporation of America, the costs by them expended and incurred in said Courts, and that this decision be certified to the District Court of Dallas County, Texas, for observance.

(Opinion of the Court by Chief Justice Greenhill)

3. Opinion of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District.

In the

Texas Court of Civil Appeals

FOR THE TWELFTH SUPREME JUDICIAL DISTRICT

No. 838

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,
Appellants,

v.

MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
Appellee.

Appeal from the 134th Judicial District Court.

July 31, 1975

Plaintiff-appellee, Matsushita Electric Corporation of America (MECA) brought suit against appellants, City of Farmers Branch, Texas, and T. E. Waldrip, the Tax Assessor-Collector of Farmers Branch, seeking a declaratory judgment that certain inventory on hand at MECA's Farmers Branch warehouse on

January 1, 1972, is exempt from taxation by virtue of the provisions of Article 1, Section 10, Clause 2 (the Import-Export Clause) of the United States Constitution. Further, MECA sought both temporary and permanent injunctions, enjoining Farmers Branch and Waldrip from attempting to impose, collect or enforce any taxes upon or with respect to the disputed inventory for the year of 1972. The trial court held that imported merchandise brought from Japan and stored in its original cartons in MECA's Farmers Branch warehouse was exempt from taxation, but that any merchandise stored in MECA's warehouse in Farmers Branch which was received from any other MECA warehouse in the United States was not exempt even if the merchandise remained in its original cartons. Also, the court held that any merchandise imported from Puerto Rico and stored in MECA's warehouse in Farmers Branch was not exempt. The parties filed stipulated facts, and pursuant to appellants' request, the trial court filed findings of fact and conclusions of law.

We have this day decided an appeal in City of Farmers Branch, et al v. American Honda Motor Co., Inc., No. 839, which appeal raised some of the same questions as are presented here.

This cause of action arose by virtue of appellants' imposition of an ad valorem tax on personal property located within Farmers Branch, under the power vested in it by Article 1165 of the Texas Revised Civil Statutes. MECA rendered to Farmers Branch for taxation certain personal property situated in its warehouse. MECA had additional personal property valued at $2,425,334.70 situated in its Farmers Branch warehouse which it did not render, claiming that the property was exempt under Article 1, Section 10, Clause 2, of the United States Constitution. Of that amount, the total value of Panasonic products imported

from Puerto Rico was $140,714.71. It is undisputed that MECA claimed this exemption and pursued all administrative remedies, but was denied the claimed exemption for the disputed inventory.

No manufacturing, repairing or servicing is carried on at the Farmers Branch warehouse, as it is only used to store the imported products prior to their sale and shipment to retailers, dealers, distributors and others in Texas, Louisiana, Mississippi, Arkansas, Oklahoma and three counties in Tennessee.

MECA did not claim any exemption from the ad valorem tax for (1) non-inventory property, (2) property not imported from outside the United States or (3) for imported products which had been removed from the corrugated cartons in which they were shipped from outside the United States. MECA did claim an exemption from taxation for the imported Panasonic products which remained in their original unbroken packages and were imported from either Japan or Puerto Rico.

The Panasonic products imported from Japan were manufactured in Japan and placed in corrugated cartons by the foreign manufacturer. Each carton was taped or stapled at the factory and was loaded into a large sea van, 40 feet long, 8 feet high and 8½ feet wide, weighing 6,260 pounds, and leased by an independent common carrier. After a sea van was loaded, it proceeded to dockside, was separated from its wheels and cab by crane and loaded onto a ship, where title to the products passed to MECA. The ship proceeded to the United States and at Seattle, Washington, the port of entry, federal custom duties were paid on the products. The entire van was removed from the ship by crane and affixed to a railroad flat car, by which it proceeded to Fort Worth, Texas. There, the van was once again affixed wheels and a cab and proceeded directly to MECA's

warehouse in Farmers Branch. Upon the van's arrival at the warehouse, each of the original corrugated cardboard cartons was unloaded and placed in the warehouse. Throughout the entire process described, the original corrugated cartons remained taped and/or stapled and were stored in that condition in the warehouse until an order was received from a dealer or distributor to purchase the particular products contained in the cartons. After unloading, the van was immediately returned to the carrier for use in transporting goods of other manufacturers and importers. At all times the van was owned or leased by the independent common carrier and MECA at no time had direct control over its progress. The Panasonic products imported from Puerto Rico were purchased by and shipped to MECA in the same manner as those imported from Japan except that the port of entry was New Orleans, Louisiana.

On a few occasions, when the MECA warehouse in Farmers Branch was in short supply of a particular Panasonic product, MECA made arrangements for a shipment of these products from another MECA warehouse in the United States. When these products arrived at the Farmers Branch facility they were in the original unbroken cartons in which they were imported from Japan or Puerto Rico.

In their first point, appellants maintain that the trial court erred in concluding that the goods in the Farmers Branch warehouse of MECA on January 1, 1972, had not been incorporated into the mass of goods in the United States, and, therefore, were still "imports" for the purposes of Article 1, Section 10, Clause 2 of the United States Constitution. Appellants argue that (1) the disputed inventory, through an elaborate marketing system, has lost its character as imports; (2) the disputed inventory

has been fully committed to appellee's operational needs and, therefore, should not be tax exempt; and (3) the act of importation may end, and in this case has ended, before the goods are removed from the original package. We disagree.

Article 1, Section 10, Clause 2 of the United States Constitution provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection laws . . ."

In Brown v. State of Maryland, 25 U. S. (12 Wheat.) 419, 6 L. Ed., 678 (1827), the Supreme Court interpreted the Import-Export Clause and adopted what has become known as the "original package" doctrine. The Court stated, speaking through Chief Justice Marshall:

> ". . . When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." Brown v. State of Maryland, supra, p. 441-2.

The United States Supreme Court has continued to apply the original package doctrine in Low v. Austin, 80 U. S. (13 Wall.) 29 (1872); Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870 (1945); and Dept. of Revenue v. Beam Distilling Co., 377 U. S. 341, 84 S. Ct. 1247 (1964). Some of the more recent state and federal court decisions which apply the "original package" doctrine to imported goods held for sale are: Wages

v. Michelin Tire Corporation, 214 S. E. 2d 349 (Georgia S. Ct., 1975) cert. granted; Wilson v. County of Wake, 199 S. E. 2d 665, 668 (N.C. Ct. App. 1973); Price Paper Corporation v. Detroit, 202 N. W. 2d 523, 525 (Ct. App., Mich. 1972); Sterling Liquor Distributors Inc. v. County of Orange, 83 Cal. Rptr. 571 (Ct. App., Cal. 1970) cert. denied, 400 U. S. 822 (1970); Tricon, Inc. v. King County, 60 Wash. 2d 392, 374 P. 2d 174 (1962) cert. denied, 372 U. S. 908 (1963); Standard-Triumph Motor Company v. City of Houston, Texas, 220 F. Supp. 732, 734 (S. D. Tex. 1963) vacated on other grounds, 347 F. 2d 194 (5th Circ. 1965) cert. denied 382 U. S. 974, 86 S. Ct. 539 (1966); State ex rel H. A. Morton Company v. Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 N. W. 2d 914 (1962); Miehle Printing Press and Manufacturing Company v. Department of Revenue, 18 Ill. 2d 445, 164 N. E. 2d 1, (Ill. 1960); Singer Co. v. County of Kings, 121 Cal. Rep. 398, (Ct. of App., Cal. 1975).

In the case at bar, the disputed inventory remained as the property of MECA, in MECA's Farmers Branch warehouse in the corrugated cartons in which it was imported. Therefore, applying the "original package" doctrine, we believe that a tax upon the disputed inventory could not escape the prohibition set forth in the Import-Export Clause of the Constitution.

In Youngstown Sheet and Tube Company v. Bowers, 358 U. S. 534, 541-2 (1959), 79 S. Ct. 383, the Supreme Court, relying upon Brown v. Maryland, reemphasized some of the acts or conduct of the importer that would deem the importer to have 'so acted upon the thing imported' as to cause it to be 'mixed up with the mass of property in the country (and to lose) its

distinctive character as an import.' The Court stated that goods lost their character as imports when the importer (1) 'sells them,' (2) '(breaks up his packages, and (travels) with them as an itinerant pedlar' or (3) when goods are brought into this country by an importer 'for his own use' and are here 'used' by him. Also, see Brown v. Maryland, supra.

In the case at bar, at the time of the controversy MECA had not (1) sold the disputed inventory, (2) broken the disputed inventory out of the corrugated cartons in which it was imported, nor (3) brought the disputed inventory into the country for its own use and here used the inventory in such a manner that it has become incorporated and mixed up with the mass of property in the country.

Appellants attempt to rationalize by analogy the facts involved in the case at bar with the opinion of the court in *Youngstown* in which the court stated that the iron ore, lumber, and veneers had been irrevocably committed to use in manufacturing at the plants to which they were shipped and that the iron ore, lumber and veneers were necessarily required to be kept on hand to meet current operational needs and were actually being used to supply those needs. To show that imported goods which are held for sale should be treated similarly to imported goods held for use in manufacturing, appellants cite a quote from Hooven & Allison Co. v. Evatt, supra, which is discussed in the following quotation from *Youngstown*, supra, 542:

> "In Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, it was held that goods imported for 'use' share the same immunity as goods imported for 'sale,' and that goods imported 'for manufacture (do not) lose their character as imports any sooner or more readily than imports for sale' (id., 324 U. S. at page 667, 65 S. Ct. at

page 373); but 'when (the imported goods are) used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.' Id., 324 U. S. at page 665, 65 S. Ct. at page 877."

The *Youngstown* case has been distinguished many times from cases similar to the case at bar, and we believe that the facts involved here are distinguishable from *Youngstown*. Later in the *Youngstown* opinion is found this language (79 S. Ct. 389):

". . . The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been 'put to the use for which they were imported' (Hooven & Allison Co. v. Evatt, supra, 324 U. S. (652) at page 657, 65 S. Ct. at page 873) for in such a case they have lost their distinctive character as imports and are subjection to taxation . . ."

We agree with a quote from Tricon, Inc. v. King County, supra, p. 176:

"We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale."

Appellants' first point is overruled.

In their second point appellants maintain the trial court erred in concluding that the general property tax imposed on the disputed inventory is an "impost" or "duty" within the meaning of

the import clause of the United States Constitution. Appellants argue that *Youngstown* established that a non-discriminatory property tax does not violate the Import-Export Clause, and that the language of the Import-Export Clause indicates that a general property tax was not within its intended prohibition. We disagree.

The Supreme Court of the United States has rejected appellants' argument in Low v. Austin, supra, by holding that while goods retain their character as imports, a tax upon them in any form is within the constitutional prohibition. The court stated: "The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as *to the power of the state to levy any tax.*" (Emphasis added.) If, in fact, any discrimination against domestic and in favor of foreign producers of goods does result because of the tax immunity of imports, such discrimination is implicit in the constitutional provision and in its purpose to protect imports from state taxation. Hooven & Allison Co. v. Evatt, supra. Moreover, the disputed inventory was subject to substantial custom duties while domestic goods are not.

The rationale of *Low* and *Hooven* that all taxes, even non-discriminatory ad valorem taxes, are unconstitutional if imposed upon merchandise which retains its status as imports has been reaffirmed in Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 76, 67 S. Ct. 156 (1946) and Department of Revenue v. James Beam Distilling Company, supra, p. 343.

Appellant also argues that the rationale employed in interstate commerce cases should be applied to the disputed inventory so that a non-discriminatory tax will not violate the import clause.

The Import-Export Clause and the Commerce Clause, while related, are not coterminous. There are two important differences between the two clauses. First the Import-Export Clause prohibits taxation by the states on the import or export, while the application of the Commerce Clause has no relationship to whether an article was, or ever had been, an import or export. Second, the Commerce Clause is not cast in terms of a prohibition against taxes but in terms of power of the Congress to regulate commerce. The Import-Export Clause does not prohibit every state from laying "any discriminatory" tax on imports or exports, but rather prohibits the state from laying "any" tax — "except what may be absolutely necessary for executing its inspection laws." Richfield Oil Corp. v. Board of Equalization, supra, 67 S. Ct. 159-60. Consequently, we cannot write any qualifications into the Import-Export Clause. Appellants' second point is overruled.

In their third point, appellants maintain the trial court erred in concluding that the goods stored in the Farmers Branch warehouse of MECA had not been removed from the containers in which they had been transported into this country and, therefore, were not subject to local taxation under the "original package" doctrine. Appellants argue that the sea van is the original package since it is the container in which the units are shipped from Japan or Puerto Rico. We do not agree.

The facts in the case at bar reveal that the sea van is furnished by the steamship lines for the purpose of carrying the corrugated cartons overseas and that when the sea vans are unloaded at Farmers Branch, they are returned to the steamship line for use in transporting goods of other manufacturers and

importers. The mere use of new technology in shipping should not destroy the tax immunity of the property shipped. Here, the use of the sea van did not go to the essential nature of the transaction, but only to formalities of transportation. Therefore, we do not believe that the opening of the sea vans constitutes the breaking of the original packages. Wages v. Michelin Tire Corporation; supra; Montgomery Ward & Co., Inc. v. County of Alameda, 390 Fd. Supp. 177 (N. D. Cal. 1975); Michigan State Tax Commission v. Garment Corpoartion, 32 Mich. App. 715, cert. denied, 404 U. S. 992 (1971).

In its first cross-point, appellee maintains the trial court erred in holding that merchandise which was imported by MECA and stored at MECA's warehouse in Farmers Branch in its original, unbroken cartons, was not exempt from taxation under the Import-Export Clause if it was first stored in some other MECA warehouse in the United States. We sustain appellee's contention.

We are unable to distinguish between the situation in which the disputed inventory is shipped directly from its port of entry to Farmers Branch and the situation in which the disputed inventory is stored in the corrugated cartons in which it was shipped in another MECA warehouse in the United States before it is shipped to Farmers Branch. The Import-Export Clause was intended to immunize imports from taxation by the importing states, and all other states through or into which they may pass so long as they retain their distinctive character as imports. Youngstown Sheet & Tube Co. v. Bowers, supra, p. 389. It matters not that the imported merchandise is stored in the original packages at the importer's warehouse at the port of entry or in an interior state. This tax immunity attaches and "survives their

arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported." Hooven & Allison Co. v. Evatt, supra, p. 657; Wilson v. County of Wake, supra.

Therefore, we believe the trial court erred in holding that the disputed inventory, which was stored in the "surplus" storage area of another warehouse before it was shipped to the Farmers Branch warehouse, is not exempt from taxation. This portion of the judgment is reversed and rendered for appellee.

In its second cross point, appellee maintains that the trial court erred in holding that merchandise imported by MECA into the United States from Puerto Rico was not an "import" within the meaning of the Import-Export Clause of the United States Constitution. We sustain appellee's contention.

Merchandise which is brought into the United States from a place without the country, even though the merchandise does not come from a foreign country, may be considered as "imports." The only material question which must be determined is whether it came from a place *without* the country. Hooven & Allison Co. v. Evatt, supra, 671.

The United States acquired Puerto Rico by cession without obligation to admit it to statehood or to incorporate it as a part of the United States. We do not believe Puerto Rico is a part of the United States in the sense that it is subject to and enjoys the benefits or protection of the Constitution as do the States which are united under the Constitution. Hooven & Allison Co. v. Evatt, supra, 678.

Puerto Rico is apparently now a commonwealth. An instrument of government or constitution was adopted by Puerto Rico pursuant to a congressional statute; and it seems to have more

autonomy than a territory but is short of statehood. If not "a territory" it is not a part of the country proper. Merchandise brought into one of the United States from Puerto Rico would be "imports" under the Import-Export Clause of the U. S. Constitution and entitled to the immunity from taxation as goods from a foreign country. See Rice Growers' Assn. of California v. County of Yolo, 94 Cal. Rep. 847, 852, 853 (Ct. of App., Cal. 1971).

Therefore, we believe that the trial court erred in holding that merchandise imported by MECA into the United States from Puerto Rico was not an "import," and that portion of the trial court's judgment is reversed and judgment is rendered in favor of appellee.

The judgment of the trial court is affirmed in part and reversed in part, and judgment is here rendered for appellee to that portion of the judgment which is reversed.

Since we have affirmed the judgment in part and reversed in part, we tax the costs on appeal and in the court below equally against appellants and appellee. Coca Cola Bottling Company of Houston v. Hobart, 423 S. W. 2d 118, 126 (Tex. Civ. App. — Houston 14th Dist., 1967, writ ref'd, n. r. e.); Combined American Insurance Company v. The City of Hillsboro, 421 S. W. 2d 488, 491 (Tex. Civ. App. — Waco, 1967, writ ref'd, n. r. e.); Wichita National Bank v. United States Fidelity & Guaranty Co., 147 S. W. 2d 295, 298 (Tex. Civ. App. — Fort Worth, 1941, n. w.h.); Rule 448, T. R. C. P.

/s/ CONNALLY MCKAY
Associate Justice

Opinion delivered:
July 31, 1975.

ON MOTION FOR REHEARING

Appellee Matsushita Electric Corp. of America, moves for a rehearing only insofar as our original opinion and judgment taxes the cost one-half to appellants and one-half to appellee. In our original opinion the judgment of the trial court was affirmed in part and reversed and rendered in part. We taxed the cost one-half to appellants and one-half to appellee.

However, appellee reminds us that the portion of the trial court's judgment we reversed was on the cross-points of appellee and therefore all relief was denied to the appellants and full relief granted to appellee.

We confess our error in this regard and accordingly that portion of our original decision in this cause is modified to the extent that all of the costs are taxed against the appellants.

Appellants also have filed a motion for rehearing which we have duly considered and same is overruled.

/s/ CONNALLY MCKAY
Associate Justice

Opinion delivered:
August 28, 1975

4. Judgment of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District.

JUDGMENT

Extract from the Minutes of August 28, 1975.

No. 838

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP

v.

MATSUSHITA ELECTRIC CORPORATION OF AMERICA

The judgment heretofore entered on July 31, 1975, is set aside and same withdrawn and the following judgment is entered in lieu therefor, to-wit.

THIS CAUSE having been transferred to this Court from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas by Order of the Supreme Court, and said cause coming on to be heard on the transcript of the record, and that the same being inspected, it is the opinion of the Court that there was error in the judgment as entered by the trial court, and that the same should be affirmed in part and reversed and rendered in part.

It is therefore ORDERED, ADJUDGED and DECREED that that portion of the trial court's judgment holding that merchandise which was imported by Matsushita Electric Corporation of America and stored in its warehouse in Farmers Branch in its original, unbroken cartons, was not exempt from taxation if it was first stored in another of its warehouses in the United States

is hereby reversed and judgment is here rendered for appellee, Matsushita Electric Corporation of America; it is further ORDERED, ADJUDGED and DECREED that that portion of the trial court's judgment holding that merchandise imported by Matsushita Electric Corporation of America into the United States from Puerto Rico was not an "import" and was subject to taxation is hereby reversed and judgment is hereby rendered for the appellee, Matsushita Electric Corporation of America; that in all other respects, the judgment of the trial court is affirmed; and that the appellee, Matsushita Electric Corporation of America, recover of and from the appellants, City of Farmers Branch, Texas, and T. E. Waldrip, jointly and severally, all costs in this behalf expended, both in this court and the court below for all of which execution may issue, and that this decision be certified to the court below for observance.

5. Opinion of the Supreme Court of Texas in a related case, City of Farmers Branch, Texas et al v. American Honda Motor Company, Inc.

In the

Supreme Court of Texas

No. B-5550

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent.

Appeal from the Texas Court of Civil Appeals
for the Twelfth Supreme Judicial District

May 5, 1976

This is a companion case to our Cause Number B-5551, City of Farmers Branch v. Matsushita Electric Corp. of America, decided this day. _____ S.W.2d _____. The cases were submitted and argued together in this court.

The Honda warehouse in Farmers Branch stores parts and accessories for Honda automobiles, motorcycles, and outboard

motors. The parts and accessories were imported from Japan in sealed sea vans. As in *Matsushita*, Farmers Branch assessed ad valorem personal property taxes on these items for the year 1972. Honda declined to pay the tax and brought this suit for a declaratory judgment that the merchandise was tax-exempt under the import-export clause, Section 10 of Article I of the United States Constitution.

The questions are the same as those presented in *Matsushita*, and the disposition of those questions in *Matsushita* control the disposition of this cause.

The judgments of the trial court and the Court of Civil Appeals are reversed; the injunction entered by the trial court against the assessment and collection of the taxes is dissolved; and judgment is here rendered that Honda is subject to the non-discriminatory ad valorem taxes assessed by Farmers Branch.

/s/ JOE R. GREENHILL
Chief Justice

Opinion delivered:
May 5, 1976